

NTSB Order No. EA-3969

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 12th day of August, 1993

Respondent .

Docket SE-11586

Respondent has appealed from the oral initial decision issued by Chief Administrative Law Judge William E. Fowler, Jr., at the conclusion of an evidentiary hearing held in this matter on October 18, 1991.¹ In that decision, the law judge affirmed the Administrator's order suspending respondent's private pilot certificate with multi-engine and instrument ratings for 90 days

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based on his altitude deviation, in alleged violation of 14 C.F.R. §§ 91.13(a), 91.123(a) and 91.135(a)(1).² For the reasons that follow, we affirm the initial decision and the order of suspension.

Respondent does not dispute that on June 24, 1989, at 2:50 p.m., during a flight in the vicinity of Richmond, Virginia, he descended his Piper Cheyenne from his assigned altitude of 25,000 feet to approximately 23,300 feet. However, he has maintained throughout this proceeding that his descent was necessitated by

² Section 91.13(a) provides:

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Section 91.123(a) provides:

§ 91.123 Compliance with ATC clearances and instructions.

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained. A pilot in command may cancel an IFR flight plan if that pilot is operating in VFR weather conditions outside of positive controlled airspace. If a pilot is uncertain of the meaning of an ATC clearance, the pilot shall immediately request clarification from ATC.

Section 91.135(a)(1) provides:

§ 91.135 Positive control areas and route segments.

(a) Except as provided in paragraph (b) of this section, no person may operate an aircraft within a positive control area or positive control route segment designated in part 71 of this chapter unless the aircraft is --

(1) Operated under IFR at a specific flight level assigned by ATC[.]

severe icing on his aircraft, which he characterizes as an emergency, and that his deviation should therefore be excused under 14 C.F.R. 91.3(b).³

Respondent testified that, although his aircraft was equipped for flight into known icing conditions, he had been experiencing icing for some time prior to entering air traffic control (ATC) sector 20, where this deviation occurred. (Tr. 104.) Upon entering sector 20, which was being controlled by radar controller Sheila Radtke at the Washington Air Route Traffic Control Center, respondent asked for a route change, and was told by controller Radtke to "standby." (Exhibit A-3.)⁴ After hearing nothing from ATC for the next ten minutes, respondent attempted twice within a two-minute period to contact ATC by transmitting his call sign, but received no response to either call.⁵ Twenty seconds later, respondent transmitted

³ Section 91.3(b) states:

(b) In an in-flight emergency requiring immediate action, the pilot in command may deviate from any rule of this part to the extent required to meet that emergency.

⁴ The requested route change ("direct Flatrock direct Armel [sic]") would have allowed respondent to turn to the west, rather than follow his assigned northeasterly route. (See Tr. 17-18, 68-9.) Although respondent implies that he requested this route change in order to avoid the icing conditions he was encountering, the Administrator's witnesses suggested that the requested route change was simply a shorter route to respondent's final destination (Lancaster, Pennsylvania.) (Tr. 52, 81.)

⁵ The ATC tape reveals that an aircraft in a military formation flight had declared an emergency just seconds before respondent's first unanswered call to Radtke, and that she was addressing the situation by splitting the formation and descending the individual aircraft.

"hotel alpha [his call sign] we'd like to cancel IFR with you," and was told by controller Radtke, "stand by I can't give you lower right now sir." (Exhibit A-3.)

Three minutes later respondent again tried unsuccessfully to reach ATC. Shortly thereafter (approximately eighteen minutes after respondent's initial request for a route change) controller Radtke noticed respondent descending from his assigned altitude of 25,000 feet, and questioned him:

[ATC]	Eight hotel alpha say intentions
[respondent]	Hotel alpha is canceling IFR ma'am ⁶
[ATC]	Hotel alpha you can't cancel at twenty five
[respondent]	Ma'am I tried to talk to yah for ten minutes
[ATC]	Eight hotel alpha there's a lot of traffic out here I don't have time for this
[respondent]	What do you want me to do
[ATC]	I want you to maintain your altitude and I'll get to you as soon as I can
[respondent]	How's twenty three thousand
[ATC]	I want you to be at twenty four
[respondent]	Twenty four thousand hotel alpha

Respondent testified that he decided to descend to the clearer sky he had seen below because he felt his aircraft was close to stalling due to ice build up, and he needed to get out

⁶ Respondent acknowledged at the hearing that he knew he could not cancel his IFR flight plan at his altitude since he was in positive control airspace, but stated that his requests to cancel his IFR flight plan were nothing more than a ploy to get the controller's attention. (Tr. 129-31.)

of the clouds. (Tr. 113, 107.) According to respondent, he had "built up a pretty good crust of ice behind the boot areas" of his aircraft, and icing had reduced his airspeed from 175 knots to 125 knots. (Tr. 106, 108.) He testified that after he entered the clearer air below, the ice "burned off" and his airspeed increased. (Tr. 113, 116.) He stated that he had no further problems with icing, even after he ascended back to 24,000 feet pursuant to ATC's instruction. (Tr. 138.)

Respondent acknowledged that at no time did he declare an emergency or squawk 7700 (the emergency transponder code), or tell ATC that he was experiencing a problem with icing, and admitted that there were at least a couple of occasions when he could have done so. (Tr. 120, 130.)

At the hearing, controller Radtke and controller Lacy Brown (who was coordinating aircraft into sector 20) testified -- and the tape and transcript of ATC communications (Exhibits A-3 and A-7) confirm -- that at the time of this incident air traffic was extremely heavy. (Tr. 15, 44.) Controller Radtke testified that she did not intentionally ignore respondent, but was simply busy with higher priority duties (e.g., flights deviating into her sector due to weather in an adjacent sector, and an emergency declared by a military formation flight.) (Tr. 19-21, 38-9.)

In his initial decision, the law judge stated that he could "empathize with Mr. Teti's situation to a certain extent. He was in a situation which was not of his own liking, a situation which he deemed to be rapidly approaching an emergency situation."

(Tr. 176.) However, he noted that respondent did not inform ATC of his situation before he began his unauthorized descent, although he knew the area was heavily congested with air traffic, and concluded that respondent demonstrated "impatience" and "poor judgment in doing what he did as he did it at the time he did it." (Tr. 176-7.) In sum, the law judge found that he could not "absolve respondent of the flying conduct that he engaged in." (Tr. 178.)

On appeal, respondent interprets the initial decision as containing a finding that respondent indeed experienced an emergency due to icing conditions. In support of this interpretation respondent cites the law judge's statement that respondent "was in a situation which he deemed to be rapidly approaching an emergency situation," and the law judge's closing comments:

I'm sure if Mr. Teti found himself in this situation again, as he himself said from the witness stand, he would use that 7700 [emergency] squawk or do something to alert Air Traffic Control.

But we would not have been here today if when he did get Air Traffic Control's attention he had just told them that he had an emergency situation. He had icing and was losing air speed.

But I would hazard a guess, Mr. Teti, that your former skills came to the fore and you thought you could extricate yourself out of this situation satisfactorily, so that you didn't so inform them. It's unfortunate from that respect, sir.

(Tr. 179-80.)

Respondent, citing Board precedent,⁷ argues that the initial decision must be reversed because the law judge found that an emergency existed, but improperly found that respondent was required to declare the emergency in order to exercise his emergency authority under section 91.3(b). We do not read the initial decision that way.

Contrary to respondent's assertion that the law judge found an emergency, we perceive no such finding in the initial decision. While we agree that the law judge's rejection of respondent's defense appears to have been based in large part on respondent's failure to inform ATC of any icing problems or to declare an emergency (either verbally or by transponder code), he did not find **respondent's deviation would have been excusable** if only he had done so. Rather, we believe the law judge's emphasis on respondent's failure to inform ATC of any problems indicates that **respondent's story would have been more credible** if he had.

In sum, it is clear to us that the law judge made a credibility finding that respondent did not in fact experience an emergency due to icing conditions which would excuse his unauthorized deviation. We see no reason to disturb this credibility

⁷ Respondent cites Administrator v. Clark, 2 NTSB 2015, 2017, n. 8 (1976) (the fact that a pilot does not formally declare an emergency on his radio does not preclude reliance on section 91.3(b) as exculpatory).

finding.⁸ See Administrator v. Smith, 5 NTSB 1560, 1563 (1986).

This is not to say that the law judge did not believe respondent experienced any icing at all. Indeed, his comments suggest that he believed respondent's story "to a certain extent." (Tr. 176.) However, he clearly did not believe that any icing respondent might have encountered constituted an emergency which justified his unauthorized descent.⁹

⁸ We note that the Administrator offered the following testimony which tended to discredit respondent's assertion of severe icing: 1) there were no pilot reports of icing in that sector that day (Tr. 15, 35, 51-5); 2) icing is not common at the altitude respondent was flying (Tr. 85); 3) respondent's flight path as shown on the radar was not erratic, as would be expected of an aircraft experiencing severe icing (Tr. 68-9); and 4) icing of the magnitude described by respondent could not have dissipated in the short amount of time (one minute and 37 seconds) it took him to descend from 25,000 feet to 23,000 feet (Tr. 160, 163).

⁹ To the extent that the initial decision could be read as holding that respondent's unauthorized descent was indeed precipitated by an emergency situation due to icing, we believe the law judge's comments indicate that it was an emergency of the respondent's own making, and therefore not exonerating. See Administrator v. Worth, NTSB Order No. EA-3595 at 7, n. 15 (1992). Specifically, we think the law judge's comment that "we would not have been here today if . . . he had just told them that he had an emergency situation," and his general disapproval of respondent's decision to "extricate" himself from the situation without informing ATC, indicates what we think is a reasonable belief that if respondent had promptly made his icing problems known to ATC his needs would have been addressed, and he could have avoided a situation where an unauthorized descent was the only way he could extricate himself.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 90-day suspension¹⁰ of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.¹¹

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹⁰ Respondent argued at the hearing that if the violations were affirmed he should be entitled to immunity from sanction based on his filing of a report under the Aviation Safety Reporting Program. (Tr. 9, 171.) Although he does not pursue this argument on appeal, we note that because his violation was deliberate and not inadvertent he is not entitled to a waiver. See Ferguson v. NTSB, 678 F.2d 821 (9th Cir. 1982).

¹¹ For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).